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Attorney for Defendant Alexander Weir V (defendant #10)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE M. JAMES LORENZ)

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ALEXANDER WEIR V,)
)
Defendant.)
_____)

CASE NO. 08CR0256-MJL

DATE: March 10, 2008
TIME: 2:00 p.m.

NOTICE OF MOTIONS AND MOTIONS TO:
(1) COMPEL FURTHER DISCOVERY; and
(2) LEAVE TO FILE FURTHER MOTIONS

TO: KAREN HEWITT, UNITED STATES ATTORNEY, AND
ANDREW SCHOPLER, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on March 10, 2008, at 2:00 p.m., or as soon thereafter as
counsel may be heard, the defendant, Alexander Weir V, by and through his attorney Benjamin P.
Lechman, will ask this Court to issue an order granting the motions listed below.

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MOTIONS

The defendant, Mr. Weir V, by and through his attorney, Benjamin P. Lechman, asks this Court pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes and local rules for an order to:

1. Compel further discovery; and
2. Leave to file further motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all other materials that may come to this Court's attention prior to or during the hearing of these motions.

Respectfully submitted,

Dated: February 25, 2008

s/Benjamin P. Lechman
BENJAMIN P. LECHMAN
Attorney for Defendant Weir V

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STATEMENT OF FACTS AND POINTS
AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTIONS

I.

STATEMENT OF FACTS

Mr. Weir V is charged along with 12 co-defendants in an indictment with conspiracy to distribute and distribution of cocaine base. Many of the defendants are also charged with distributing methamphetamine (Mr. Weir V is not charged with the methamphetamine offenses).

Because as yet only one CD-rom of discovery (containing wiretap applications and affidavits) has been produced, and it is early in the proceedings, Mr. Weir V, does not offer a detailed set of facts in addition to the indictment at this time. Thus, the facts alleged in these motions are subject to amplification and/or modification at the time these motions are heard.

1 II.

2 MOTION TO COMPEL DISCOVERY

3 Mr. Weir V moves for the production by the government of the following discovery. This
 4 request is not limited to those items that the prosecutor knows of, but rather includes all discovery listed
 5 below that is in the custody, control, care, or knowledge of any government agency. See generally Kyles
 6 v. Whitley, ___ U.S. ___, 115 S. Ct. 1555, 1567-68 (1995); United States v. Lacy, 896 F. Supp. 982 (N.D.
 7 Cal. 1995) (prosecutor has duty to ascertain what exculpatory information may be possessed by other
 8 agencies):

9 (1) The Defendant's Statements Under Fed. R. Crim. P. 16 (a)(1)(A) the defendant is entitled to
 10 disclosure of all copies of any written or recorded statements made by the defendant; the substance of
 11 any statements made by the defendant which the government intends to offer in evidence at trial; any
 12 recorded testimony of the defendant before the grand jury; any response by the defendant to
 13 interrogation; the substance of any oral statements which the government intends to introduce at trial,
 14 and any written summaries of the defendant's oral statements contained in the handwritten notes of the
 15 government agent; any response to any Miranda warnings which may have been given to the defendant
 16 (See United States v. McElroy, 697 F.2d 459 (2d Cir. 1982)); and any other statements by the defendant
 17 that are discoverable under Fed. R. Crim. P. 16(a)(1)(A);

18 (2) Arrest Reports, Notes and Dispatch Tapes The defendant also specifically requests that all
 19 arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding his
 20 arrest or any questioning, if such reports have not already been produced in their entirety, be turned over
 21 to him. This request includes, but is not limited to, any rough notes, records, reports, transcripts or other
 22 documents in which statements of the defendant or any other discoverable material is contained. This is
 23 all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963). See
 24 also United States v. Johnson, 525 F.2d 999 (2d Cir. 1975); United States v. Lewis, 511 F.2d 798 (D.C.
 25 Cir. 1975); United States v. Pilnick, 267 F. Supp. 791 (S.D.N.Y. 1967); Loux v. United States, 389 F.2d
 26 911 (9th Cir. 1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes,
 27 sworn statements, and prosecution reports pertaining to the defendant are available under Fed. R. Crim.
 28 P. 16(a)(1)(B) and ©, Fed. R. Crim. P. 26.2 and 12(i). **Preservation of rough notes is requested,**

1 **whether or not the government deems them discoverable at this time;**

2 (3) Brady Material The defendant requests all documents, statements, agents' reports, and
3 tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of
4 the government's case. Impeachment as well as exculpatory evidence falls within Brady's definition of
5 evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs,
6 427 U.S. 97 (1976);

7 (4) Any Information That May result in a Lower Sentence Under The Guidelines As discussed
8 above, this information is discoverable under Brady v. Maryland, 373 U.S. 83(1963). This request
9 includes any cooperation or attempted cooperation by the defendant, as well as any information that
10 could affect any base offense level or specific offense characteristic under Chapter Two of the
11 Guidelines. Also included in this request is any information relevant to a Chapter Three adjustment, a
12 determination of the defendant's criminal history, or any other application of the Guidelines;

13 (5) The Defendant's Prior Record Evidence of prior record is available under Fed. R. Crim. P.
14 16(a)(1)(B). Counsel specifically
15 requests a complete copy of any criminal record;

16 (6) Any Proposed 404(b) Evidence Evidence of prior similar acts is discoverable under Fed. R.
17 Crim. P. 16(a)(1)© and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R. Evid. 404(b), "upon
18 request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the
19 general nature . . ." of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at
20 trial. The defendant requests that such notice be given three weeks before trial in order to give the
21 defense time to adequately investigate and prepare for trial;

22 (7) Evidence Seized Evidence seized as a result of any search, either warrantless or with a
23 warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)©;

24 (8) Request for Preservation of Evidence The defendant specifically requests that all dispatch
25 tapes or any other physical evidence that may be destroyed, lost, or otherwise put out of the possession,
26 custody, or care of the government and which relate to the arrest or the events leading to the arrest in this
27 case be preserved.

28 It is requested that the government be ordered to question all the agencies and individuals

involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does exist to inform those parties to preserve any such evidence;

(9) Tangible Objects The defendant requests, under Fed. R. Crim. P. 16(a)(2)(c) the opportunity to inspect and copy as well as test, if necessary, all other documents and tangible objects, including photographs, books, papers, documents, photographs of buildings or places or copies of portions thereof which are material to the defense or intended for use in the government's case-in-chief or were obtained from or belong to the defendant;

(10) Evidence of Bias or Motive to Lie The defendant requests any evidence that any prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988);

(11) Impeachment evidence The defendant requests any evidence that any prospective government witness has engaged in any criminal act whether or not resulting in a conviction and whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609 and 613. Such evidence is discoverable under Brady v. Maryland, supra. See United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) (witness' prior record); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts from a witness' credibility);

(12) Evidence of Criminal Investigation of Any Government Witness The defendant requests any evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir.), cert. denied, 474 U.S. 945 (1985);

(13) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling The defense requests any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic. United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980);

(14) Witness Addresses The defendant requests the name and last known address of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United

1 States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses by counsel is
2 ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. (1979) (defense has equal right to talk
3 to witnesses). The defendant also requests the name and last known address of every witness to the
4 crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be
5 called as a government witness. United States v. Cadet, 727 F.2d, 1453 (9th Cir. 1984);

6 (15) Name of Witnesses Favorable to the Defendant The defendant requests the name of any
7 witness who made an arguably favorable statement concerning the defendant or who could not identify
8 him or who was unsure of his identity, or participation in the crime charged. Jackson v. Wainwright,
9 390 F.2d 288 (5th Cir. 1968); Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980); Jones v.
10 Jago, 575 F.2d 1164, 1168 (6th Cir.), cert. denied, 439 U.S. 883 (1978); Hudson v. Blackburn, 601 F.2d
11 785 (5th Cir. 1979), cert. denied, 444 U.S. 1086 (1980);

12 (16) Statements Relevant to the Defense The defendant requests disclosure of any statement that
13 may be "relevant to any possible defense or contention" that he might assert. United States v. Bailleaux,
14 685 F.2d 1105 (9th Cir. 1982);

15 (17) Jencks Act Material The defense requests all material to which Defendant is entitled
16 pursuant to the Jencks Act, 18 U.S.C. § 3500, reasonably in advance of trial, including dispatch tapes. A
17 verbal acknowledgment that "rough" notes constitute an accurate account of the witness' interview is
18 sufficient for the report or notes to qualify as a statement under § 3500(e)(1). Campbell v. United States,
19 373 U.S. 487, 490-92 (1963);

20 (18) Giglio Information Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the defendant
21 requests all statements and/or promises express or implied made to any government witnesses, in
22 exchange for their testimony in this case, and all other information which could arguably be used for the
23 impeachment of any government witnesses.

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2 **III.**

3 **REQUEST FOR LEAVE TO FILE FURTHER MOTIONS**

4 At present, the government has provided very little discovery – only one CD-rom containing
5 wiretap applications and affidavits – in this case. Without the aid of additional information, defense
6 counsel cannot adequately prepare or file substantive motions. Accordingly, Mr. Weir V respectfully
7 requests leave of this Court to file additional motions after discovery has been provided in this case.
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9 **IV.**

10 **CONCLUSION**

11 For the foregoing reasons, it is respectfully requested that the Court grant the above motions.
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13 Respectfully submitted,
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18 Dated: February 25, 2008

s/Benjamin P. Lechman
BENJAMIN P. LECHMAN
Attorney for Defendant Weir V